Saint Marys Hospital *and* Hotel, Hospital, Restaurant & Tavern Employees Union Local 21, affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO *and* International Union of Operating Engineers, Local 756, AFL-CIO. Cases 18-CA-6886 and 18-CA-6913

March 26, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On October 21, 1981, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, Hotel, Hospital, Restaurant & Tavern Employees Union Local 21, affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, filed exceptions and the Employer filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] We note that the case cited by the Administrative Law Judge at fn. 20 of his Decision was adopted by the Board *pro forma* in the absence of exceptions.

DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was heard pursuant to due notice on June 22, 1981, in Rochester, Minnesota.

The charge in Case 18-CA-6886 was filed on October 1, 1980. The first amended charge in Case 18-CA-6886 was filed on October 31, 1980. The charge in Case 18-CA-6913 was filed on October 14, 1980. The first amended charge in Case 18-CA-6913 was filed on October 30, 1980. The order consolidating cases was issued on November 10, 1980. The consolidated complaint in this matter was issued on November 10, 1980.

The essential issues concern whether Respondent has refused to bargain with the Unions concerning a dental plan for several bargaining units, or whether the Unions' right to bargain as to such plan was waived by the bargaining for the existing collective-bargaining agreements.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by Respondent and the General Counsel and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

The facts herein are based on the pleadings and admissions therein.

Saint Marys Hospital, Respondent, a Minnesota corporation, with an office and place of business in Rochester, Minnesota, herein called Respondent's facility, has been engaged as a health care institution in the operation of a hospital providing inpatient and outpatient medical and professional care services for acutely ill patients. During the calendar year ending December 31, 1979, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $250,000.

During the period of time described above, Respondent, in the course and conduct of its business operations described above, purchased and received at its Rochester, Minnesota, facility supplies, goods, and materials valued in excess of $5,000 directly from points outside the State of Minnesota.

Saint Marys Hospital was founded in 1883 and opened for operations in 1889. At such time the Hospital was operated by a religious order affiliated with the Roman Catholic Church.[1] The operation of the Hospital continued as such until 1967. In 1967 Saint Marys Hospital became self-incorporated, separate from the above-referred-to order. The articles of incorporation provided that the Hospital own its own assets, and could sell, transfer, or take whatever actions as might be necessary in order to conduct the business of running a Catholic hospital. Under the 1967 incorporation, Saint Marys Hospital is basically free to operate as it sees fit. In the event that Saint Marys Hospital goes out of business, there are certain conditions which must be met in accordance with the laws of the State of Minnesota as to disposal of assets, and proceeds are to revert back to the religious order. Before there can be a merger of Saint Marys Hospital with another health care institution, transfer of ownership would require approval by the referred-to religious order. Otherwise, Saint Marys Hospital operates on the basis that its administrator is responsible to the board of trustees as a tax exempt corporation.

Saint Marys Hospital has 15 trustees. One of such trustees must be the president of the religious order. Other trustees must be elected and may be members of

[1] Said order is described in the record as "Sisters of St. Francis of the Third Order of Assisi" and "Third Order of the Sisters of St. Francis of Assisi."

the religious order. At the time of the hearing of this matter, 5 of the 15 trustees were members of the religious order, including the president. Saint Marys Hospital employs employees who are not of the Catholic faith. Saint Marys Hospital also treats patients who are not of the Catholic faith.

Saint Marys Hospital, in carrying out its operations, follows the ethical directives of the Catholic Health Association, a set of operational directives for all Catholic hospitals. Among the policies and principles involved in the operation of the Hospital is a policy that the Hospital will not perform abortions and will not knowingly, through its health benefit plan, pay for or provide the medical treatment or hospitalization required for abortions.

Saint Marys Hospital is staffed exclusively by physicians of the Mayo Clinic located in Rochester, Minnesota. Its patients are admitted by reference from the Mayo Clinic or by entrance through the emergency room which is under Mayo Clinic physician coverage. Saint Marys employs around 3,400 employees.

Saint Marys has had collective-bargaining agreements concerning its employees since 1945. Originally, there was one union representing employees. Such union was Hotel, Hospital, Restaurant & Tavern Employees Union Local 21, affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO. Around 1952 the employee unit represented by Local 21 apparently broke into several units with Local 21 continuing to represent the largest unit,[2] with International Union of Operating Engineers, Local 756, AFL-CIO, representing a unit of approximately 20 power plant employees, and with Local 2002[3] representing a unit of approximately 55 maintenance employees.

Saint Marys had collective-bargaining agreements with Local 21 from 1945 to 1952 and since 1952 has had collective-bargaining agreements with Locals 21, 756, and 2002. The contracts with Local 21, since 1961, have been for 3-year terms.

Saint Marys has bargained with Locals 21 and 756 concerning medical benefits in the past and has agreed to certain provisions in collective-bargaining agreements concerning medical benefits. Such bargaining concerning medical benefits has not concerned the providing of insurance or medical service for abortions.

The only contention against the assertion of jurisdiction by the Board over Respondent is revealed by the following excerpts from Respondent's brief.

> Saint Marys Hospital contends that application of the National Labor Relations Act to Saint Marys Hospital would unconstitutionally impact upon the Hospital in its free exercise of its religious principles, in violation of the First Amendment of the Constitution of the United States, and in that context the Congress did not intend that the Act apply to a hospital operated by a religious order. The controlling case appears to be *N.L.R.B.* v. *The Catholic Bishop of Chicago*, 440 U.S. 367, 99 S. Ct. 1313 . . . 85 LC Para. 11,163 (1979). The Supreme Court held that the Statute did not apply to the Catholic Schools of Chicago, the implication being that if the Statute did apply, it would unconstitutionally impact upon the religious instruction carried out in the school system. In the case of Saint Marys Hospital, its guiding principles and tenets, as an expression of its religion, bar it from providing or paying for abortions. Yet the provisions of a medical benefit plan which provided medical care to its employees would clearly be a mandatory subject of bargaining under the Act. To force Saint Marys to bargain on the inclusion of abortion related care in its Medical Benefit Plan would in that instance unconstitutionally impact upon and conflict with its exercise of its religious principles. Under the principles expressed in the *Bishop of Chicago* case and in *St. Elizabeth Community Hospital* v. *N.L.R.B.*, 626 F.2d 123, 89 LC Para. 12,223 (9th Cir. 1980), remanding 237 NLRB No. 118, 1978 C.C.H. NLRB Para. 19,612 the Board should recognize that the Statute does not apply to Saint Marys Hospital and that the Board has no jurisdiction over Saint Marys Hospital. There are, of course, other principles and tenets of the Catholic religion which govern the operation of the hospital but the impact of the duty to bargain upon its expression of its religious principles is graphically demonstrated by the example of the provision of medical care and treatment for abortions. Saint Marys Hospital does not provide or pay for such care. To apply the Statute to Saint Marys Hospital and require it to bargain on a medical benefit plan providing such benefits would be unconstitutional.

Considering the record, the above arguments, the cases cited therein, and the legislative history of the coverage of nonprofit hospitals under the National Labor Act, 1974, Public Law 93-360 (S. 3203), I am persuaded that the Board should assert jurisdiction over the Respondent. A review of the legislative history concerning coverage of nonprofit hospitals as set forth above clearly revealed that Congress considered exemption of religious hospitals from coverage of the Act and rejected such exemption. It is clear that Congress intended that hospitals not be excluded from the Act because of their religious status.[4] It is well settled that the Board assumes the constitutionality of a statute it is charged with administering until the contrary is determined.[5] It also follows that where congressional intent is clear, the Board will construe such statute in accordance with such clear intent

[2] Local 21 represented approximately 650 employees. Local 21's unit consisted of service personnel and certified operating room technicians.

[3] Referred to in the brief as Local 2002, affiliated with Painters, Decorators and Paperhangers of America.

[4] Presentation of amendments by Senator Ervin of North Carolina, filing of briefs by the Seven Day Adventists, and discussions by senators and congressmen in the deliberations and arguments over the question of coverage of church supported hospitals and the question of church doctrine, and the voting on such amendments reveal the clear intent of Congress to include religious hospitals under coverage of the Act and not to exempt such hospitals from coverage.

[5] *Corry Foam Products Co. Firestone Foam Products Company, A Division of Firestone Tire and Rubber Company*, 201 NLRB 273, 274, fn. 3 (1973). See also cases cited therein.

and will assume the constitutionality of the statute as construed until the contrary has been determined by the courts.

The Supreme Court of the United States in *N.L.R.B.* v. *The Catholic Bishop of Chicago*, 400 U.S. 367 (1979), did not pass on the constitutional questions presented in such case. Rather, the Court construed that Congress had not intended that teachers in church-operated schools be covered by the National Labor Relations Act because there was no clear expression of affirmative intention by the Congress in such regard. The Supreme Court indicated that it would not construe the intent of Congress to cover such teachers, absent clear affirmation of intent, when to do so would call upon the Court to resolve difficult and sensitive questions arising out of guarantees of religious clauses of first amendment to the U.S. Constitution.

In the instant case, congressional intent to include coverage of nonprofit religious hospitals under the Act is clear. None of the cases cited reveals that the Board has construed congressional intent in a different manner. Therefore, until a different decision or ruling by the Board has been made, it is clear that I must find that jurisdiction over Respondent should be asserted.[6]

Accordingly, it is concluded and found that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED[7]

Hotel, Hospital, Restaurant & Tavern Employees Union Local 21, affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

International Union of Operating Engineers, Local 756, AFL-CIO, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Appropriate Bargaining Units*[8]

1. The classifications of Respondent's employees set forth in the collective-bargaining agreement between Local 21[9] and Respondent effective from April 23, 1979, through April 22, 1982, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. The classifications of Respondent's employees set forth in the collective-bargaining agreement between Local 756[10] and Respondent effective from June 15, 1979, through June 14, 1982, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

B. *Majority Status*[11]

1. At all times material herein, Local 21 has been the designated exclusive collective-bargaining representative of Respondent's employees in the unit described above, and has been recognized as such representative by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period April 23, 1979, through April 22, 1982.

Based on the foregoing, I conclude and find that, at all times material herein, Local 21, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit described above, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

2. At all times material herein, Local 756 has been the designated exclusive collective-bargaining representative of Respondent's employees in the unit described above, and has been recognized as such representative by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period June 15, 1979, through June 14, 1982.

Based on the foregoing, I conclude and find that, at all times material herein, Local 756, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit described above, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

C. *Local 21 and Respondent*

1. Bargaining history—Background

For some years Local 21 and Respondent have had collective-bargaining agreements containing provisions relating to medical benefits for employees. During the negotiations for the 1976–79 bargaining agreement, Local 21 for the first time made a proposal (in writing) for the providing of full dental care for employees in the bargaining unit by Respondent. Such proposal was in effect as follows:[12]

> The present medical and surgical plan for employees in the Bargaining Unit is inadequate. The cost of services by the Mayo Clinic are such that

[6] Under such circumstances, little would be gained by a discussion of whether or not there is an intrusion or minor intrusion in the religious affairs or beliefs of the Hospital, or whether any problems can be solved by practical accommodation.

[7] The facts are based on the pleadings and admissions therein.

[8] The facts are based upon the pleadings, admissions therein, stipulations, and statements narrowing the issues. The parties noted certain reservations which have no effect upon the findings of fact for this proceeding.

[9] Hotel, Hospital, Restaurant & Tavern Employees Union Local 21, affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, will sometimes herein be referred to simply as Local 21.

[10] International Union of Operating Engineers, Local 756, AFL-CIO, shall sometimes be referred to herein simply as Local 756.

[11] The facts are based upon the pleadings, admissions therein, stipulations, and statements narrowing the issues.

[12] Briefs by the parties contain in effect proposed findings of fact. Where such proposed findings of fact are supported by evidence in the record and agree with the findings of fact I deem warranted, I have utilized the same as my own, with modifications as may be necessary.

bargaining unit employees find themselves in a financial condition that doesn't permit them to pay bills for hospitalization, medical or surgical treatment.

We, therefore, propose that the Employer provide full medical, surgical, hospitalization, eye and dental care for all employees and their dependents at no cost to the employee. Such coverage should be provided on the 31st day of the employee's services to Saint Marys Hospital.

We propose a life insurance and disability plan for all employees to take effect on the employee's 31st day of employment. We propose that such a plan will, after thirty (30) days' employment, provide the employee an amount of life insurance equal to one (1) year's salary with double indemnity; after one (1) year of continuous employment provide each employee with an amount of life insurance equal to two (2) years' salary with double indemnity, and after two (2) years of continuous employment provide each employee with an amount of life insurance equal to three (3) years' salary with double indemnity.

Like amounts will be paid to disabled employees.

Proof of insurance coverage in accordance with the Working Agreement will be provided to Local 21 on a monthly basis.

In addition, there were many other proposals. The parties negotiated to impasse on a number of issues, including the issue of the changes to be made in the medical benefit plan. The Hospital's proposal in 1976 offered changes in the plan in several major respects, including the provision of life insurance and disability insurance but not the provision for dental care. That issue and many other unresolved issues were submitted to arbitrator Reynolds Seitz for resolution. The proposal of the Hospital as to changes in the plan, plus the granting of life and disability insurance, was specifically adopted and approved by the arbitrator with the consequent rejection of the additional union demand for dental care.

In 1979, Local 21 gave notice of its intention to open the negotiations which resulted in the current agreement. It gave to the Hospital proposals for change which affected every article of the contract and addressed many separate items. The Union's proposal for changes in the medical benefit plan at Saint Marys Hospital read as follows:

Article XVI.

Section 2—We propose that the EMPLOYER provide full hospitalization, medical & surgical, life disability, optical and dental insurance to all employees at no cost to the employee.

During the early bargaining sessions around late January (January 31, 1979) and early February 1979, the parties had discussions concerning Local 21's proposal for dental care coverage. What occurred is revealed by the following credited excerpts from Jackson's testimony.

Q. Do you recall whether the subject of dental or optical insurance for employees came up at either of these first two meetings?

A. Yes.

Q. What do you recall being said, and by whom?

A. Well, I don't remember how it came about. It was obvious, to me, what we wanted, but the discussion did get started and John Wolf, the director of personnel at the time, said, one, that we don't have any such benefit at the institution, which of course I knew.

Secondly, that the institution did not intend to provide any such benefits unless and until such time as they had a facility under the roof—I am assuming that he meant under the roof there at Saint Marys—to provide this benefit.

Also, that the cost was—he did not use this word, but I took what he said to mean—prohibitive, that it was a very costly thing.

Those were the objections, and I took them to be reasons that he would say they were not about to provide these benefits.

On February 20, 1979, Respondent submitted its proposals concerning hospitalization, medical, and surgical benefits. Local 21 offered no counterproposals with regard to these levels of coverage, and the Employer's proposals were subsequently incorporated into the new agreement.[13] Jackson credibly testified that the subject of optical and dental insurance "was mentioned several times" during the course of negotiations, but that it was "dealt with rather lightly because it was obvious that the statements that John Wolf had made earlier were the position of the Employer." After many negotiating sessions, a tentative agreement was reached on July 20, 1979, which reserved four issues to be submitted for interest arbitration.[14] Prior to the arbitration, however, the parties reached agreement on the remaining issues, and the new collective-bargaining agreement, effective by its terms from April 23, 1979, through April 22, 1982, was dated October 5, 1979, and signed by the parties. This agreement did not provide for optical or dental coverage for unit employees.

The contract did not have a "zipper" clause of the type specifically designed to bar negotiation on any item mentioned or not mentioned. Some of the evidence presented in this case was designed to reveal that a specific bargain had been made concerning use of sick leave and the withdrawal of the Union's dental care proposal. Such evidence pertained to notes by the parties as to withdrawal of certain issues. Suffice it to say, the overall facts indicate that the parties were confused on June 28, 1979, as to what was being taken care of and as to whether the Union's dental care proposal was being withdrawn.[15] In any event, the Union's dental care pro-

[13] All employees, including supervisory personnel, are covered by the same hospitalization, medical, and surgical plan.

[14] The overall facts are indicative that the Union's dental care proposal was abandoned as of around July 20, 1979.

[15] In view of the overall record, I find Jackson's testimony to appear more reliable than Wells' as to whether or not the Union's dental care

Continued

posal, if it were not abandoned as of July 20, 1979, continued as a proposal until the contract was finally agreed upon.[16]

Subsequent to the above-referred-to contract, the Respondent has not bargained with Local 21 concerning a dental care plan. There has been bargaining concerning a change in wage scale. Further, Respondent and Local 21 on occasion in the past have by mutual agreement bargained concerning subjects wherein there was not an existing obligation to bargain for a change in terms and conditions.[17]

2. The demand for bargaining—the refusal to bargain

At some point of time, apparently in May or June 1980, Respondent decided to implement a dental insurance plan through Connecticut General Life Insurance[18] for its employees whose conditions of employment were not covered by collective-bargaining agreements. Thereafter, a news bulletin of Saint Marys Hospital, apparently a newspaper for employees, dated June 1980, volume 39, no. 6, advised employees of such new benefits. The new dental care benefits for noncontract employees became effective on July 1, 1980. Apparently Jackson, representative for the Union, learned of such benefits for noncontract employees. In any event, in 1980, before June 17, 1980, Jackson learned that the Hospital had expanded its medical benefit plan for nonunion employees by the addition of a certain amount of dental care and treatment to the plan through the mechanism of insurance. Thereafter on or about June 17, 1980, Jackson transmitted a letter to the following effect to Respondent.

Mr. John Wolf, Director
Human Resources
Saint Marys Hospital
1216 SW 2nd Street
Rochester, Minnesota 55901

Dear Mr. Wolf:

It has come to our attention that "non-contract" employees at Saint Marys Hospital of Rochester, will be provided with a dental insurance plan on and after July 1, 1980.

During our union contract negotiations the hospital representatives rejected the proposition for dental care because "we don't have such benefits for any of our employees" and that "until we have a facility for dental we will not be able to consider such a plan."

Please be advised that Local 21 hereby respectfully requests and demands that representatives of Saint Marys Hospital and representatives of Local 21 meet immediately for the purpose of adding the dental plan to the Collective Bargaining Agreement.

Yours truly,
Buck Jackson
Business Manager
Local 21

On or about June 26, 1980, Respondent transmitted a letter to the following effect to Local 21.

Mr. Emery T. Jackson
Business Agent
Hotel, Hospital, Restaurant and Tavern
Employees Union, Local 21
P.O. Box 1196
Rochester, Minnesota 55901

Dear Mr. Jackson:

Your letter of June 17th to Saint Marys Hospital concerning the dental plan was referred to me for response.

The contract is not open for negotiations at this time. As you are well aware, Saint Marys Hospital has already provided to Local 21 a voluntary increase in compensation and is not interested in further negotiations at this time. We will discuss that issue, along with others, when the contract is opened for negotiations in 1982.

Very truly yours,
Ronald L. Seeger

D. *Local 756 and Respondent*

1. Bargaining history—background

For some years, Respondent and Local 756 have had collective-bargaining agreements containing provisions relating to medical benefits. On or about March 23, 1979, Local 756 transmitted the following letter to Respondent.

Mr. Roger E. Wells, Asst. Administrator
Saint Mary's Hospital
Rochester, Minnesota

Dear Mr. Wells:

The expiration date of the present agreement between St. Mary's Hospital and Local 756 of the International Union of Operating Engineers being June 14, 1979, we hereby give notice of intention to negotiate wages and fringe benefits in a new agreement for the year starting June 15, 1979.

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proposal was withdrawn on June 28, 1979. I credit Jackson's testimony to the effect that such proposal was not withdrawn at that time. I discredit Wells' proposal to the effect that the Union's dental care proposal was withdrawn at that time. Wells appeared to have little or no independent recollection that such dental care proposal was withdrawn at that time. Rather, Wells appears to have interpreted his notes of the events to such effect. His actual notes merely related as follows: "Sick leave . . . used for dental, physical, et cetera." "Articles XIII, XIV, XV and XVI—taken care of." It is obvious that such notation could be notes to indicate simply an intention by the Respondent to take care of such articles by its proposal, and not that the Union had withdrawn its proposals. Art. XVI related to the Union's medical (including dental care) proposal.

[16] It is noted that, as to any unresolved issues, the parties had the right to submit the same to interest arbitration.

[17] However, such subjects of bargaining were of the type that the parties were not free to make unilateral changes (without bargaining).

[18] The specific dental plan instituted by Respondent on July 1, 1980, was not discussed with Local 21 or Local 756 at any time during the bargaining sessions referred to herein.

Respectfully yours:
Michael H. Reilly
Recording Secretary
Local #756 I.U.O.E.

On or about April 19, 1979, Respondent replied to the Union's March 23, 1979, letter as follows:

Mr. Michael H. Reilly
Recording Secretary
Local #756 I.U.O.E.
4726 Eighteenth Street Southeast
Rochester, Minnesota 55901

Dear Mr. Reilly:

Your letter of March 23 to Saint Marys Hospital has been referred to me for response.

In reviewing the Agreement, I noted that it requires 90 days' notice for a re-opener and that your notice was late. However, with the mutual good will that has existed for many years between your Union and the Hospital, we feel it would be inequitable to insist upon a technical extension of the Contract without a thorough discussion and review of the proposals which you have submitted. We are prepared to commence that review at a mutually convenient date.

I will phone Mr. Peterson to agree upon a date to begin that discussion.

Very truly yours,
Ronald L. Seeger

Accompanying Local 756's March 23, 1979, letter, set out above, was a copy of a letter dated March 22, 1979, which commenced as follows and included thereafter specific proposals for the 1979 contract.

Mr. Roger E. Wells
Assistant Administrator
Support Services
St. Marys Hospital

Dear Mr. Wells:

We, the Power plant Employees, are submitting these proposals for consideration by the Hospital. We would like a meeting as soon as possible with the Hospital to discuss these proposals. Mr. Dennis R. Peterson, Attorney at Law, will be with us at the negotiations.

In such proposals were proposals for a "Medical Plan" as set out below.

Medical plan should be completely revised to meet modern day costs.

A. The outpatient coverage is too low.
B. $50,000 lifetime maximum is too low.

Medical and hospitalization should be covered 100%. Dependent coverage should be paid by the Hospital. Hospital should have a dental plan for the employee and the employee's dependents. Each employee would be given a general physical once a year at the Mayo Clinic on his anniversary date.

Respectfully submitted,
Roger W. Martin
Shop Steward
Local #756, I.U.O.E.

The above-referred-to proposal relating to dental care was discussed at the first bargaining session on May 1, 1979. What occurred is revealed by the following excerpts from Martin's credited testimony.

Q. Directing your attention to Page 3 of Joint Exhibit No. 33, would you take a moment to just look at that, and does that provide, in part, that the hospital should have a dental plan for the employees and the employee's attendants.

A. Yes, it does.

Q. Did you discuss that particular proposal at the first session?

A. Yes, we did.

Q. What do you recall being said and by whom?

A. As we got to this proposal, there was a conversation from Mr. Ron Seeger to the effect that this was a costly proposal, the hospital couldn't finance it, and also that our membership, being a small group, couldn't ask for something that the rest of the employees didn't have, and being that we were under a blanket coverage, they couldn't give to us something that the rest of them would want or they couldn't give to the rest of them.

Q. Do you recall whether there was any reply from the union's side to that?

A. There was some discussion to the effect that we were bargaining as our own, single, individual unit, and it shouldn't be taken into account that what we got someone else should have and vice versa. We were in negotiations for ourselves, and this was a proposal that we thought was beneficial to our members of the local.

Q. Was there anything further you recall being said about dental at this first meeting?

A. No, because after that we proceeded on to the rest of the proposals.

During the May 1, 1979, negotiation meeting, Local 756 requested that the Respondent respond to the Union's proposal in writing. On May 23, 1979, Respondent's attorney, Seeger, transmitted a letter including Respondent's response to the Union's proposals. The first paragraph of Seeger's letter was as follows:

You have submitted certain proposals to Saint Marys Hospital for change in the current working agreement. At our negotiating meeting you asked that the Hospital respond to those proposals in writing. Where no response is made, the proposal is refused. Taking your proposals in order, the Hospital would propose a complete package settlement as follows:

Thereafter, Seeger's letter proceeded with in effect a breakdown of its response. Respondent's response relating to the Union's medical benefit (including dental care) plan was as follows:

BENEFIT PLAN

The Hospital's proposed benefit plan is attached to this proposal.* We would offer to explain the changes across the bargaining table or to the entire group at a convenient time.

* Mr. Wolf will forward the material directly to Mr. Martin.

Said benefit plan of Respondent was apparently forwarded around this time, as indicated, to Martin for Local 756.

On June 4, 1979, Local 756 responded by letter to Respondent's May 23, 1979, counterproposals. In such response the Union made some changes in its proposals. As to Respondent's benefit plan proposal, Local 756 set forth that, "No written comments will be made on this proposal at this time, but we are studying the pamphlet and shall make our proposal at our next meeting."

The question of the Union's dental care proposal was discussed at the second bargaining session on June 7, 1979. What occurred is revealed by the following credited excerpts from Martin's testimony.

> It would have come up very briefly at the second meeting, and then only tied in with the major medical. We got the impression at that first meeting that the idea of dental coverage was a dead issue, you know, it was an issue that couldn't be pursued. So, if at all in the second session we were talking major medical in that session, it very likely would have been dealt on very briefly.

Negotiations between Local 756 and Respondent occurred on May 1, June 7 and 13, July 5, 26, 27, and 28, and August 2, 1979. A collective-bargaining contract was finally executed by the parties on September 27 and 28, 1979.

As the negotiations proceeded, at some point of time, the question of Local 756's proposal relating to dental care became eliminated as an issue. Such is revealed by the following credited excerpts from Martin's testimony.[19]

> Q. Again, we stipulated that the sessions went on through August 2nd. As the negotiations progressed, can you tell us what the principal issues were that remained unresolved between the parties?
>
> A. Yes. The length of contract would have been a primary proposal, the wages for the next period, for the length of the next contract would have been a bargaining point. We had a stipulation in our contract of a classification that the employer wanted to delete and we wanted to keep, so this was a bargaining point that we discussed.
>
> We talked about a medical bank for our sick leave coverage. We talked about some more holidays in the floating holiday type of system, and things of this nature.

On July 20, 1979, the Union gave notice to Respondent of its intent to strike and picket because of the impasse reached in negotiations. The Employer's representatives filed a petition for a restraining order on August 1, 1979, with a district court of the State of Minnesota. The petition was granted prohibiting the Union from striking and compelling them to proceed in arbitration. Negotiations resumed on August 2, resulting in an agreement on the remaining issues and the membership acceptance of them on September 28, 1979. The final agreement contained the medical plan as originally proposed by Respondent and did not include dental care insurance.

2. The demand for bargaining—the refusal to bargain

Local 756 learned of Respondent's granting of dental care benefits to employees at some point of time prior to August 11, 1980. Thereafter, on or about August 11, 1980, Local 756 transmitted the following letter to Respondent.

> Mr. Wayne Spary
> St. Marys Hospital
> Rochester, MN 55901
>
> Mr. John Wolf
> St. Marys Hospital
> Rochester, MN 55901
>
> Mr. Roger Wells
> St. Marys Hospital
> Rochester, MN 55901
>
> Gentlemen:
>
> Pursuant to Section Two, Article Ten of the current bargaining agreement in effect by and between the hospital and Operating Engineers Local 756, this is to inform you that after having exhausted step One of the grievance procedure we now file this written grievance with the employer as follows:
>
> That the hospital's offer of dental, health and care benefits to all non-union employees of the hospital is a violation of the bargaining agreement by and between the parties, Section One concerning discrimination as well as a violation of the State and Federal labor relations acts.
>
> As you well know, the Union made a demand for such benefits during the negotiation of the current contract and said request was denied by the hospital on the grounds that they could not afford such a benefit in the package. We feel that such a request on behalf of all non-union members is a direct appeal to every employee of the hospital to be discouraged to participate in union membership and is an effort to discriminate against said members.

[19] Roger Martin, the witness, was a steward for Local 756 and involved in the bargaining for the 1979 contract.

May we have a meeting with management within five days in order to attempt to amicably conclude this matter or in the alternative proceed to step three of the grievance procedure.

Yours truly,
LOCAL 756
BY———————————
Shop Steward, Leonard Carlson

Following the above letter, Local 756 also transmitted the following letter on September 22, 1980:

Mr. Wayne Spary
St. Marys Hospital
Rochester, MN 55901

Mr. John Wolf
St. Marys Hospital
Rochester, MN 55901

Mr. Roger Wells
St. Marys Hospital
Rochester, MN 55901

Gentlemen:

This is to inform you that pursuant to Section Three, Article Ten of the grievance procedure we hereby name Dennis R. Peterson of Rochester, Minnesota, as the arbitrator on behalf of the Union. Kindly provide me with the selection of the hospital chairperson in order that we may proceed to select a third impartial arbitrator to negotiate the issue as follows:

That the hospital's offer of dental, health and care benefits to all non-union employees of the hospital is a violation of the bargaining agreement by and between the parties, Section One concerning discrimination as well as a violation of the State and Federal labor relations acts.

Yours truly,
LOCAL 756
BY———————————

Shop Steward
Leonard Carlson

Respondent replied to Local 756's request for artibration and request for negotiations by transmittal of the following letter dated September 26, 1980.

Mr. Leonard Carlson
Shop Steward
Union Local 756
Operating Engineers
Saint Marys Power Plant

Dear Mr. Carlson:

This letter acknowledges your September 22 correspondence to Saint Marys Hospital requesting to negotiate an issue regarding dental insurance.

Saint Marys Hospital hereby advises you that it does not consider your grievance to be arbitrable as your complaint is not within the scope of our Agreement.

Saint Marys Hospital considers our present Agreement to be honored according to its stated terms. Your request to negotiate over dental insurance may be considered at the next round of negotiations when the contract is open.

Sincerely yours,

Roger E. Wells
Assistant Administrator

Following the above, Respondent has not bargained with Local 756 concerning a dental care plan. There has been some bargaining on other issues. The history of bargaining by Respondent with unions reveals that Respondent and unions have bargained about items at times when bargaining was not required but when the parties were mutually willing to bargain about such issues.

E. Miscellaneous

Some evidence was presented concerning Respondent's awareness of bargaining by the Minnesota Nurses' Association in the Minneapolis-St. Paul area. Such evidence is revealed by the following excerpts from Wells' testimony.

Q. Is it your understanding that in the spring of 1980 the Minnesota Nurses' Association entered into contract negotiations with hospitals in the Twin Cities area, is that your understanding?

A. That's my understanding.

Q. How did you learn that, Mr. Wells?

A. I'm not sure. I suppose our director of human resources would have reported that to the administration. There is a state personnel directors society and they are in touch constantly as to what is going on in hospitals. Also, those contracts we follow pretty closely because we try and follow the nursing contract as closely as possible, that, Minneapolis, being our closest source of recruitment of nurses, as well as competition. So we would know when those contracts were coming up.

* * * * *

Q. Now, it is a fact that the Minnesota Nurses Association negotiated an agreement with hospitals in the Twin Cities area that provides for dental insurance for certain employees, right?

A. I don't know.

During the presentation of this evidence, the General Counsel indicated that his case was not based on a discrimination type theory, that there were not 8(a)(3) allegations despite the fact that the original charge had included allegations of conduct violative of Section 8(a)(3).

F. *Contentions and Conclusions*

The ultimate facts and issues concerning whether Respondent has refused to bargain with Local 21 and Local 756 are essentially similar.[20]

The General Counsel contends in effect that the Unions had a statutory right to bargain concerning a dental plan, that the Unions had not waived the right to bargain about a dental plan, that, for a waiver to be effective, it must be clear and unmistakable and involve a conscious relinquishment which is clearly intended and expressed. Respondent contends that the bargaining by the parties with respect to the Local 21 (1979-82) and the Local 756 (1979-82) contracts revealed conscious relinquishments of the Unions' proposals for a dental care plan, that in effect the Unions had waived their right to bargain as to a dental plan during the period of time governed by the referred to contracts, and that Respondent was not obligated to bargain about a dental care plan since "health care" provisions had been a part of the referred-to contracts as negotiated.

The General Counsel argues that Board decisions such as the *B. F. Goodrich Company*, 195 NLRB 914, support a finding that the Unions in the instant case had not waived their right to bargain over a dental care plan. In the *B. F. Goodrich* case, the union had not made a proposal about a "stock purchase plan" but merely inquired about a rumor that the company intended to institute such a plan. Upon a reply that there were no plans for a stock purchase plan, the union did not pursue the issue. In my opinion, the failure to pursue an inquiry under such circumstances is clearly distinguishable from the withdrawal of a proposal made by the Union. The latter, if done as part of a bargain, can clearly constitute a waiver as to bargaining about the subject matter involved. Similarly, the facts in *N L Industries, Inc.*, 220 NLRB 41 (1975), are distinguishable from the facts in the instant case. In the *N L* case the parties had discussed in negotiations a profit-sharing plan but had not discussed a savings plan. Here, the parties have discussed a proposal relating to a "full" dental care plan, or to a dental plan. Thus, unlike the *N L* case, the issue involved had been negotiated about and constitutes a part of the overall bargaining.[21]

The determination of whether or not there has been a waiver of a statutory right requires a careful consideration of all of the facts. Further, careful consideration must be given to the extent of the alleged waiver. Where the overall facts reveal that the parties have made a bargain concerning a waiver or limitation of a statutory right, careful scrutiny is made of the facts, and the waiver or limitation of a statutory right will be limited to the exact bargain made.

The General Counsel contends that there was not a waiver of bargaining by the Unions as regards a dental plan because the evidence does not reveal that the Unions clearly intended to waive the right to bargain and clearly expressed such waiver. I do not agree. A viewing of the facts as a whole reveals, in my opinion, that the Unions clearly and consciously relinquished their right to bargain over a dental plan and clearly intended to waive their right to bargain as to a dental plan. In *American Telephone and Telegraph Company—Long Lines Department*, 250 NLRB 47 (1980), the Board affirmed language by Administrative Law Judge Winkler relating to the principles concerning waiver of statutory rights by a union. Administrative Law Judge Winkler set forth that waiver required a conscious relinquishment, clearly intended and expressed to give up the statutory right. Administrative Law Judge Winkler set forth, however, that such doctrine of waiver was different from the situation involving questions of bargaining about substantive rights. In *Radioear Corporation*, 214 NLRB 362 (1974), the Board has set forth that it does not apply a rigid formula in the determination of whether there has been a waiver of bargaining about a substantive matter flowing from past bargaining for an existing contract.

Where an expressed formal proposal concerning dental care has been made, where such proposal has been discussed, where such proposal has been made by the union throughout most or all of the bargaining, and where such proposal is eliminated from the final agreement, it is hard to believe that the overall actions of the union, in entering into a final agreement, do not reveal a conscious relinquishment and waiver of bargaining as to a dental care provision, and do not reveal that such conscious relinquishment and waiver was clearly intended and clearly expressed.[22] In the absence of evidence not presented in this case, it is clear that the facts reveal a conscious relinquishment and waiver of the right to bargain about a dental plan during the period of the contracts entered into by the parties in 1979.[23]

It appears clear that the waiver or bargain made by the Unions in the instant case would not have left Respondent free to make unilateral changes in the conditions of employment of bargaining unit employees. However, Respondent's institution of a dental care plan for certain employees not within the bargaining unit does not constitute a unilateral change within the meaning of the Act. Although such employees, as became covered by a dental plan, are not employees in the bargaining units, and apparently are not employees represented by unions, no evidence has been presented to reveal that the

[20] On September 30, 1981, I issued a decision in *Rochester Methodist Hospital*, Case 18-CA-7097, JD-505-81, wherein the facts, although differing in respect from the facts in the instant case, are ultimately similar to the facts in this case. The fundamental principles of law applicable to the *Rochester* case and the instant case are the same. I have freely used the same language, or tailored language, as used in the *Rochester* case in the setting forth of the contentions and conclusions in this case.

[21] Cf. *National Broadcasting*, 252 NLRB 187 (1980). In the *National Broadcasting Co., Inc.* case, the Board found that the union had not waived its right to bargain about a savings plan. I note that the facts in such case suggest that the respondent therein had engaged in deception during bargaining, or at least had not been frank and forthright.

[22] Conscious relinquishment, bargain, or waiver can be proven and often is proven by the persuasiveness of overall facts. It is not necessary that the proof be in specific writing or by specific statement. In criminal law, circumstantial evidence may be found to be sufficient to establish guilt beyond a reasonable doubt. Similarly, the overall facts relating to negotiations may clearly reveal a conscious relinquishment, a bargain, or a waiver as to bargaining.

[23] There is no contention and no evidence to support contentions that the Unions by inadvertent error overlooked or forgot their dental care proposals.

granting of a dental plan to some employees was motivated because they were represented or not represented by a union.

The General Counsel contends that the specifics of the dental care plan, initiated for nonbargaining unit employees, were not discussed, that, therefore, the Unions did not waive bargaining as to such plan for bargaining unit employees. I am not persuaded that this argument has merit. Rather, the Unions' proposal during bargaining concerned a full dental plan or a dental plan. The facts reveal a conscious relinquishment of such proposals as part of the final bargains. Certainly, the relinquishment of a proposal for a full or of a simply referred-to dental plan, without qualification, constitutes a relinquishment of proposals for dental plans in general.

The General Counsel cites cases concerning alleged waiver of statutory rights. Respondent cites cases concerning the same subjects and *argues* that Respondent is being asked to modify the existing contract, and that bargaining as to such modification, by definition, is not required by Section 8(d) of the Act.[24] Many of the cited cases concerning alleged waivers of statutory rights touch upon question of statutory rights *other* than the right to bargain. The Board has discussed the question of alleged waiver of the statutory right to bargain in the same general terms of waiver doctrine as applied to other statutory rights. The Board, however, has said that it views a question of waiver as to bargaining rights as being dependent on the overall bargaining and that it does not utilize a rigid formula in its determination.[25] It appears that consideration is given in waiver of statutory rights questions, other than bargaining rights, of the bargain made as compared to the alleged right waived. As to a waiver of bargaining rights, the major thrust is whether the right to bargain about the subject matter involved has been exercised, and has resulted in a bargain for a fixed term. Thus, the Board considers whether there has been a conscious relinquishment of the right to bargain about certain proposals and whether the overall facts reveal such relinquishment was clearly intended, expressed, or deemed as part of the overall bargain. If so, the Board finds that there has been a waiver and that Section 8(d) of the Act does not require parties to bargain about such subject matter as involved. Of course, such does not leave the parties free to make unilateral changes in terms and conditions of employment.

It is clear that some changes in conditions of employment constitute modification of existing contracts. As to other changes, the determination by the Board of whether there has or has not been a waiver, or whether a bargain has been made, appears to merge the question of waiver and of whether there has been an attempt to modify an existing term of a fixed term contract. In any event, the same result appears to flow from a consideration of the Board's waiver doctrine as applied or from a consideration of the meaning of Section 8(d) of the Act.[26]

In sum, the facts reveal that the Unions, during the bargaining for the 1979 contracts with Respondent, consciously relinquished their proposals for a dental plan in such contracts, and that such relinquishment in effect constituted a part of the bargains for such contracts. Under such circumstances, Respondent had no obligation to bargain with the Unions when requested to do so about a dental care plan in June, August, and September 1980, and for the duration of said referred-to contracts.[27] Accordingly, the facts are insufficient to reveal that Respondent has violated Section 8(a)(5) and (1) of the Act, as alleged.[28] It is so concluded and found.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Saint Marys Hospital, Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel, Hospital, Restaurant & Tavern Employees Union, Local 21, affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. International Union of Operating Engineers, Local 756, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. The facts do not establish that Respondent has violated Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[29]

The consolidated complaint in this matter is dismissed in its entirety.

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[24] Sec. 8(d) of the Act sets forth in effect that the duty to bargain does not include a requirement for discussion or agreement as to the modification of a term or condition contained in a contract for a fixed period.

[25] See *Radioear Corporation, supra.*

[26] *The Jacobs Manufacturing Co.*, 94 NLRB 1214, 1227-28 (1951); *Triangle PWC, Inc., a subsidiary of Triangle Industries, Inc.*, 231 NLRB 492 (1977).

[27] I note, however, that Respondent must bargain about any changes it wishes to make in said contract, and that this is subject to whether the Unions so desire to bargain.

[28] See *Jacobs Mfg. Co., supra*, and *Triangle PWC, Inc., a subsidiary of Triangle Industries, Inc., supra.*

[29] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.